IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 19, 2014 Session

J. L. FRALIX v. THE UNIVERSITY OF TENNESSEE

Appeal from the Chancery Court for Davidson County
No. 13138IV Russell T. Perkins, Chancellor

No. M2014-00342-COA-R3-CV - Filed December 2, 2014

Plaintiff, a former employee of the Middle Tennessee Research and Education Center of the University of Tennessee, appeals the termination of his employment for gross misconduct in violation of the University's Code of Conduct. He contends the statement he admittedly made to a female employee on university property did not justify termination of his employment. We affirm the termination of plaintiff's employment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and W. NEAL MCBRAYER, JJ., joined.

Gene Hallworth, Columbia, Tennessee, for the appellant, J. L. Fralix.

Michael D. Fitzgerald, Knoxville, Tennessee, for the appellee, University of Tennessee Knoxville.

OPINION

The undisputed incident which led to the termination of employment of J. L. Fralix ("Plaintiff") occurred at the Middle Tennessee Research and Education Center ("MTREC"), a 1,265 acre farm owned by the University of Tennessee. Plaintiff, who regularly worked at another University of Tennessee farm, was temporarily assigned to work at MTREC due to a shortage of staff. Thirteen full-time employees worked at MTREC, six of whom lived in houses on the farm, and one of whom was a young female employee who worked in the dairy barn. When Plaintiff worked at MTREC, he temporarily resided in a house on MTREC farm property.

On March 16, 2012, between 5:00 and 5:30 p.m., a young female employee was working alone in the MTREC dairy barn. The fact that she would be working alone was known to the other employees because the protocol was for only one employee to work in the barn per shift. Plaintiff, who had no reason to be in the barn, approached the female employee from behind while she was picking up a hose to clean the barn, at which time he stated to her, "If I could get inside of you, it would take a bulldozer to get me out." Although Plaintiff was "close enough to touch" her when he made the statement, he did not, and both of them promptly exited the barn after the incident. After subsequently speaking with her parents, the female employee reported the incident to the dairy barn manager on March 29, 2012.

On the same day the female employee reported the incident, a male employee of MTREC informed the Director of MTREC, Kevin Thompson, that he had a telephone conversation with Plaintiff on March 16, 2012, the day of the incident; he further informed Director Thompson that, during the phone conversation, Plaintiff stated that he "wanted to get [the young female] and take her down to one of the houses there that's on the [MTREC] property that – and just, you know, have his way with her, . . . have sex with her. . . ."

Director Thompson met with the female employee on April 2, 2012, to discuss the incident that occurred two weeks earlier. When he was called on to describe his meeting with her, Director Thompson stated that she was "extremely scared," "crying," and "somewhat hysterical" when she discussed the incident with him. Director Thompson also met with Plaintiff on April 2, 2012. When confronted with what had been reported to Director Thompson, Plaintiff did not deny making the statement to the female employee in the MTREC barn, and he did not deny making the statement to his male colleague by phone on the same day as the incident.

On April 13, 2012, Mr. Thompson notified Plaintiff by letter that his employment may be terminated for violating the University's Code of Conduct; the letter also afforded Plaintiff official notice of a pre-termination meeting that was going to be held on April 18, 2012.

At the pre-termination meeting, Plaintiff was given notice of the reasons why termination was contemplated and an opportunity to respond, but Plaintiff did not respond. Thereafter, Director Thompson terminated Plaintiff's employment for the following reasons: (1) the University's inability to prevent Plaintiff from having isolated contact with female employees; (2) at least five families resided at the farm where Plaintiff worked full time; and (3) the farms collaborate with a community college veterinary technician program, which means Plaintiff would be interacting with many young females.

Plaintiff subsequently requested a hearing under the university's human resources policy. The hearing was held on September 10, 2012, and it was presided over by an Administrative Law Judge ("ALJ"). Plaintiff was present but did not testify at the hearing. The ALJ entered an initial order on December 3, 2012, upholding Director Thompson's termination of Plaintiff based on the finding his behavior constituted gross misconduct, and concluding that proper notice of the hearing was provided. Plaintiff did not request review by an agency head; therefore, the order became a final judgment on December 18, 2012.

Plaintiff timely filed a petition for judicial review in the Davidson County Chancery Court. On January 16, 2014, the Chancery Court entered a memorandum and order upholding Plaintiff's termination, concluding there was substantial and material evidence to support the agency's order and there was no prejudicial error below. This appeal followed.

Plaintiff raises four issues for our consideration, but we have determined the dispositive issue before this court is whether the record contains substantial and material evidence to support the initial order entered by the ALJ terminating Plaintiff's employment for gross misconduct.

APPELLATE REVIEW UNDER THE ADMINISTRATIVE PROCEDURES ACT

Judicial review of decisions of administrative agencies, when those agencies are acting within their area of specialized knowledge, experience, and expertise, is governed by the narrow standard contained in Tenn. Code Ann. § 4-5-322(h) rather than the broad standard of review used in other civil appeals. *Willamette Indus., Inc. v. Tennessee Assessment Appeals Comm'n,* 11 S.W.3d 142, 147 (Tenn. Ct. App. 1999) (citing *Wayne Cnty v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn. Ct. App. 1988)).

The trial court may reverse or modify the decision of the agency if the petitioner's rights have been prejudiced because the administrative findings, inferences, conclusions or decisions are, *inter alia*, arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion, or unsupported by evidence which is both substantial and material in the light of the entire record. Tenn. Code Ann. § 4-5-322(h)(4) & (5)(A). However, the court may not substitute its judgment concerning the weight of the evidence for that of the agency as to questions of fact. Tenn. Code Ann. § 4-5-322(h)(5)(B); *see Jones v. Bureau of TennCare*, 94 S.W.3d 495, 501 (Tenn. Ct. App. 2002); s*ee also Humana of Tennessee v. Tennessee Health Facilities Comm'n*, 551 S.W.2d 664, 667-68 (Tenn. 1977) (holding the trial court and the appellate court must review these matters pursuant to the narrower statutory criteria).

The standard of review in Tenn. Code Ann. § 4-5-322(h)(5), which pertains to whether the record contains substantial and material evidence to support the decision of the agency, is narrower than the standard of review normally applicable to other civil cases. *Jackson Mobilphone Co., Inc. v. Tennessee Serv. Public Comm'n*, 876 S.W.2d 106, 110 (Tenn. Ct. App. 1993). What amounts to "substantial and material" evidence under Tenn. Code Ann. § 4-5-322(h) is understood to require "something less than a preponderance of the evidence,. . . but more than a scintilla or glimmer." *Gluck v. Civil Serv. Comm'n*, 15 S.W.3d 486, 490 (Tenn. Ct. App. 1999) (quoting *Wayne County*, 756 S.W.2d at 280). In determining the substantiality of evidence, the statute provides that the reviewing court "shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Tenn. Code Ann. § 4-5-322(h)(5)(B); *see also Humana of Tennessee*, 551 S.W.2d at 667 (holding "the General Assembly intended that the trial court should review factual issues upon a standard of substantial and material evidence"). Further, no agency decision resulting from a hearing in a contested case shall be reversed or modified by the reviewing court "unless for errors that affect the merits of such decision." Tenn. Code Ann. § 4-5-322(i).

While this court may consider evidence in the record that detracts from its weight, the court is not allowed to substitute its judgment for that of the agency concerning the weight of the evidence. Tenn. Code Ann. § 4-5-322(h)(5)(B). "The evidence before the tribunal must be such relevant evidence as a reasonable mind might accept as adequate to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration." *Gluck*, 15 S.W.3d at 490 (citing *Pace v. Garbage Disposal Dist.*, 390 S.W.2d 461, 463 (Tenn. Ct. App. 1965)).

ANALYSIS

The facts of this case are undisputed; thus, it is undisputed what Plaintiff said to the female employee in the MTREC barn on March 16, 2012, and it is undisputed what he said to another MTREC employee during their phone conversation on the same date. Accordingly, the sole issue is whether the undisputed facts constitute substantial and material evidence to support the decision of the ALJ to terminate Plaintiff's employment for gross misconduct under the University of Tennessee's Code of Conduct.

The Code of Conduct in effect at all times material to this case stated in pertinent part:

> The University of Tennessee places a high value on human relations, human diversity and human rights. Consistent with these values, the university strives to maintain a work environment that is characterized by mutual respect for all

> individuals. Such an environment has no place for harassment or discrimination based on race, gender, religion, national origin, age, veteran status, or disability; such behavior will not be tolerated. . . . *The following behaviors are specifically prohibited*:
>
> > a. *Disorderly conduct*, *to include but not limited to, using* discriminatory, *abusive*, *or threatening language*, fighting, provoking a fight, or attempting bodily harm or injury *to another employee* or to any other individual, or threatening physical action or injury *on university property or during university activities*; or other conduct which threatens or endangers the health, safety, or well-being of any person.
> >
> > b. *Sexual harassment of employees*, students, donors, customers, visitors, patients, vendors or any other person on university property or during university activities.

The University's Disciplinary Action policy further defines "gross misconduct" as follows:

> *Gross misconduct includes* the following: theft or dishonesty; gross insubordination, willful destruction of university property; falsification of records; *acts of moral turpitude*; reporting for duty under the influence of intoxicants; the illegal use, manufacturing, possessing, distributing, purchasing or dispensing of controlled substances or alcohol; disorderly conduct; provoking a fight; and *other similar acts involving intolerable behavior by the employee. In a case of gross misconduct, immediate disciplinary action up to and including discharge may be taken*.

(Emphasis added).

Considering the undisputed facts of this case, the Code of Conduct, and the Disciplinary Action policy stated above, we see no need to engage in a tortious legal analysis of Plaintiff's intolerable behavior; specifically, the statement made by Plaintiff to a female employee in the workplace on university property on March 16, 2012. It is self-evident that Plaintiff's statement to a female co-worker shall not be tolerated in the work place. Stated another way, the fact that the statement constitutes gross misconduct under the University's Code of Conduct is "as plain as a fly floating in a bowl of buttermilk," a colorful phrase that has been used in numerous appellate decisions to explain why a party is not required to present expert testimony to prove that which is of "common knowledge." *See Martin v. Sizemore*, 78 S.W.3d 249, 272-73 (Tenn. Ct. App. 2001) (stating "[t]he "common knowledge

exception" developed in professional liability cases is equally applicable to administrative disciplinary proceedings such as this one."); *see also Patterson v. Arif*, 173 S.W.3d 8, 12 (Tenn. Ct. App. 2005); *Murphy v. Schwartz*, 739 S.W.2d 777, 778 (Tenn. Ct. App. 1986).

For the foregoing reasons, we have concluded: (1) that the statement by Plaintiff qualifies as sexual harassment of another employee on university property during university activities in violation of subsection (b) of the Code of Conduct; and (2) that Plaintiff's statement also qualifies as an act of moral turpitude and intolerable behavior that falls within the definition of "gross misconduct" in the Disciplinary Action policy stated above.

We, therefore, readily conclude that his statements constitute gross misconduct in violation of the Code of Conduct of the University of Tennessee for which he was justifiably terminated from employment by the University of Tennessee. For the foregoing reasons, we affirm the termination of Plaintiff's employment.

IN CONCLUSION

The judgment of the trial court is affirmed and this matter is remanded with costs of appeal assessed against the appellant, J. L. Fralix.

FRANK G. CLEMENT, JR., JUDGE